No. 79-1625

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In the Supreme Court of the United States

OCTOBER TERM, 1979

SIERRA CLUB, ET AL., PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-62) is reported at 610 F. 2d 581. The opinion of the district court (Pet. App. 63-130) is reported at 400 F. Supp. 610.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. A petition for rehearing filed by the petitioners was denied on January 17, 1980. The petition for a writ of certiorari was filed on April 16, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Central Valley Project, including the Tracy Pumping Plant, has been "affirmatively authorized by

Congress," thereby exempting the Secretary of the Interior from the requirement of obtaining a permit from the Secretary of the Army, pursuant to Section 10 of the Rivers and Harbors Act of 1899.

STATEMENT

1. The Central Valley Project (CVP) is the federal portion of an integrated system of engineering works constructed with the objective, among others, of storing and transporting water from the northern portion of California, where water is relatively abundant, to the arid southern portion of the State.[1] An integral component of the CVP is the Tracy Pumping Plant, which lifts water from the Delta (a low-lying area of islands and interconnecting channels at the confluence of the Sacramento and San Joaquin Rivers) to the northern terminus of the Delta-Mendota Canal. That canal in turn conveys the water southward (Pet. App. 8-9). The Tracy Pumping Plant commenced operations in 1951 (Pet. App. 69).

2. In 1971, petitioners initiated this action, alleging, among other things, that the operation of the Tracy Pumping Plant was illegal because the Secretary of the Interior, who is charged with the responsibility of administering the CVP, had not obtained a permit to operate the Tracy Pumping Plant from the Secretary of the Army pursuant to Section 10 of the Rivers and

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[1] A fuller statement of the facts of this case is included at pages 2 to 7 of the federal respondents' consolidated response to the pending petitions in *State of California* v. *Sierra Club* and *Kern County Water Agency* v. *Sierra Club*, Nos. 79-1252 and 79-1502 respectively, petitions that seek review of the same court of appeals decision as the one concerned here but that raise different issues. We confine the Statement in this response to those facts having a bearing on the issue raised by the present petitioners.

Harbors Act of 1899, 33 U.S.C. 403. The federal defendants responded, *inter alia*, that Section 10 is, by its terms, applicable only to the "creation of any obstruction [to navigation] not affirmatively authorized by Congress" and that no Section 10 permit was required for the operations of the Tracy Pumping Plant because the CVP, including the Tracy Pumping Plant, has been affirmatively authorized by Congress.

The district court, after finding that the operations of the Tracy Pumping Plant created an obstruction to the navigable capacity of various navigable waters in the Delta (Pet. App. 93), held that Congress did not authorize the Plant with sufficient clarity "for the purpose of Section 10" (Pet. App. 102) and that, in any event, approval to construct a water project does not constitute approval to operate it. The court explained (Pet. App. 102-103; footnotes omitted):

> In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. For the most part these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis Unit. All Congress did was authorize the construction of those projects and appropriate funds for them. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect. Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to

> consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization.

Thus, more than 25 years after the Tracy Pumping Plant became operational, the district court held that Congress did not authorize the operation of that vital link in the Central Valley Project.

3. On appeal, the court of appeals reversed the portion of the district court's decision holding that the operation of the Tracy Pumping Plant was not affirmatively authorized by Congress (Pet. App. 39-49). First, relying on this Court's decision in *United States* v. *Arizona*, 295 U.S. 174 (1935), the court of appeals held (Pet. App. 43) that congressional approval or authorization may be found in virtually any type of statute, including appropriations statutes. Second, regarding the appropriate standard to be employed in determining whether congressional authorization exists for the purposes of Section 10, the court (Pet. App. 43-44) adopted the standard embodied in the applicable regulation of the Corps of Engineers (33 C.F.R. 322.3(c)(1)), which states in pertinent part that "the legislative history and or provisions of the Act [in question] should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States * * *." Finally, reviewing numerous statutes (including appropriation acts) pertaining to the CVP, including, specifically, the Tracy Pumping Plant and the Delta-Mendota Canal, the court found (Pet. App. 44-49) that the Secretary of the Interior was not required to obtain a Section 10 permit because the operations of the Tracy Pumping Plant have been affirmatively authorized

by Congress. Judge Tang, concurring (Pet. App. 55-62), distinguished the present case from the court of appeals' earlier decision in *Libby Rod and Gun Club* v. *Poteat*, 594 F. 2d 742 (9th Cir. 1979), which involved a similar issue. He explained that the statutes in question here evinced a clear congressional intent to authorize, whereas such evidence of intent had been lacking in *Libby*.

ARGUMENT

Petitioners necessarily acknowledge (Pet. 8-9) that the permit requirements of Section 10 are inapplicable to activities "affirmatively authorized by Congress"; and they agree (Pet. 9-10) with the court below that the proper test to be applied in determining whether the Tracy Pumping Plant was affirmatively authorized for the purposes of Section 10 is the standard set out in the applicable regulation of the Corps of Engineers (33 C.F.R. 322.3(c)(1)), namely, whether "the legislative history and/or provisions of the [statutes in question] * * * clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States." Thus, the narrow issue presented by the petition is whether the particular statutes pertaining to the Tracy Pumping Plant, when considered with their legislative histories, evince a congressional intent affirmatively to authorize the operations of the Tracy Pumping Plant. The court of appeals' resolution of that issue is correct and does not conflict with decisions of this Court or other courts of appeals. Review is accordingly unwarranted.

1. As the court of appeals correctly found, the relevant statutes and their legislative histories show a clear congressional intent to authorize both the construction and the operation of the Tracy Pumping Plant, an

essential component of the CVP. From the beginning, the CVP included proposals to divert water from the Delta to the southern San Joaquin Valley. In 1935, Congress passed the Emergency Relief Appropriation Act, ch. 48, 49 Stat. 115, which authorized the President to expend funds on such public construction projects as he deemed proper, including diversions of water, flood control and irrigation. Pursuant to this Act, the President allocated funds to commence construction of the CVP. Executive Order of September 10, 1935, reprinted in House Comm. on Interior and Insular Affairs, *Central Valley Project Documents* (Part 1), H.R. Doc. No. 416, 84th Cong., 2d Sess. 559-560 (1956) [hereinafter "*CVP Documents*"]. The Secretary of the Interior then submitted to the President a "Finding of Feasibility" that described the CVP. *Id.* at 562-567. Included as an integral feature of the Project was the "San Joaquin River pumping system," described as "five dam and pumping plants on San Joaquin River to mouth of Merced River; and four pumping plants and 65 miles of canal on the westerly side of San Joaquin Valley." *Id.* at 565.

In 1937, Congress enacted the Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850, in which it reauthorized "the entire Central Valley project * * * heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935." Thus, as of 1937, Congress had unquestionably authorized the CVP, and the plans contemplated a large-scale diversion of water from the Delta to the San Joaquin Valley, even if the Delta-Mendota Canal and the Tracy Pumping Plant in their exact present form were not yet specifically described.

Subsequently, Congress enacted the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187, now codified at 43 U.S.C. 485 *et seq.* Section 9(a) of that Act, 43 U.S.C. 485h(a), provides that federal reclamation projects become automatically authorized when the Secretary of the Interior finds them to be feasible and submits a favorable report to the President and to Congress. On February 24, 1947, the Secretary of the Interior forwarded to Congress a Finding of Feasibility pursuant to the 1939 Reclamation Act. H.R. Doc. No. 146, 80th Cong., 1st Sess. (1947), reprinted in *CVP Documents* (Part 1), 574-601. The report disclosed that "[t]he Central Valley project has for its major purpose the transfer of Sacramento River water southward to the San Joaquin Valley where it is needed for irrigation and municipal and industrial water supply." *Id.* at 575. The Delta-Mendota Canal was included as a principal feature of the project and was described as follows (*id.* at 589):

> (g) Delta-Mendota Canal, testing and surveying for which is partially complete, and on which construction is now beginning, will be 120 miles long with an intake capacity of 4,600 cubic feet per second gradually reducing to 3,200 cubic feet per second. It will carry water from the terminus of the Delta Cross Channel to Mendota pool to replace water diverted from the San Joaquin River at Millerton Lake into the Madera and Friant-Kern Canals. Although designed to carry 4,600 cubic feet per second, the initial diversion will be only 3,500 cubic feet per second, the additional 1,100 cubic feet per second capacity being reserved for future use in areas along the length of the canal when anticipated additional storage is available on the Sacramento River system.

Clearly, this extract alone provides, in the words of the applicable regulation, "the exact location and plans from which Congress could have considered the effect on navigable waters."[2]

Further proof that Congress knew and approved of the Tracy Pumping Plant and the Delta-Mendota Canal is indicated by the fact that in 1960 Congress itself set certain statutory limitations on the diversions of water through those facilities under given conditions. Section 4 of the Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 159, which authorized construction of the San Luis Unit of the CVP,[3] provides:

> If the Secretary proceeds to construct, operate, and maintain the San Luis works under the terms of section 1 of this Act solely as a Federal project, the operation shall be subject to the following restriction: Whenever the chlorides in the water at the head of

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[2]Petitioner attempts (Pet. 15-16) to minimize the significance of H.R. Doc. No. 146 by stating that it fails even to mention the Tracy Pumping Plant by name. However, as shown, the report describes the Delta-Mendota Canal in detail, including projected rates of water exports from the Delta. Of course, those exports could occur only if water is pumped into the canal.

[3]The San Luis Unit of the CVP was designed to use water pumped from the Delta via the Tracy Pumping Plant. As the relevant House report explains (H.R. Rep. No. 399, 86th Cong., 1st Sess. 4 (1959)):

> Water available in the Sacramento-San Joaquin Delta, either as unregulated flows or as a result of Central Valley project storage, would be pumped via the existing Tracy pumps and the Delta-Mendota Canal to the San Luis Reservoir or directly to the irrigation canal system through which it would be distributed to the project service area.

There is no indication that Congress authorized and directed the Secretary of the Interior to build and operate the San Luis Unit if, and only if, the Corps of Engineers subsequently determined to issue a Section 10 permit.

> the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, the mean daily diversion from the Sacramento-San Joaquin Delta to San Luis unit via Tracy pumping plant and Delta-Mendota Canal as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

In addition to enacting the above statutes, Congress has, over the years, repeatedly appropriated funds for the Tracy Pumping Plant, the Delta-Mendota Canal, and the power lines from Shasta and Keswick Dams to the Tracy Plant.[4]

In sum, Congress has been fully informed concerning all aspects of the CVP, including the facilities at issue. In light of that knowledge, Congress has authorized, reauthorized, and appropriated funds for the construction and the operation of the Tracy Pumping Plant and has even imposed specific statutory criteria concerning the operation of that facility under certain circumstances.

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[4]Some representative examples of specific congressional consideration of the Tracy Pumping Plant and the Delta-Mendota Canal may be conveniently found in *CVP Documents* (Part 2), H.R. Doc. No. 246, 85th Cong., 1st Sess. 21-28, 32-38, 40-44, 47, 50-51 (1957). See also *Hearings on the First Deficiency Appropriation Bill for 1946 Before the Subcomm. of the House Comm. on Appropriations*, 79th Cong., 1st Sess., Part 2, 332-336, 341-342, 348-349, 350, 355, 359-361 (1945); *Hearings on the Interior Department Appropriation Bill for 1946 Before the Subcomm. of the House Comm. on Appropriations*, 79th Cong., 1st Sess., Part 1, 1199-1204, 1212 (1945); *Hearings on the Interior Department Appropriation Bill for 1948 Before the Subcomm. of the House Comm. on Appropriations*, 80th Cong., 1st Sess., Part 3, 722-726, 739, 741, 752, 760, 765-768, 785-786, 882-887 (1947). Numerous other examples could be cited, but these are sufficient to show how Congress, through the appropriation process, repeatedly scrutinized every detail of the entire CVP, including the facilities at issue here.

Notably absent in the legislative record is any indication that Congress authorized and funded the CVP with the intent that the Corps of Engineers should subsequently determine, under Section 10, the extent, if any, to which the facilities may be used for the purpose for which they were constructed.

3. Petitioners assert (Pet. 21-23) that the showing of congressional intent to authorize the operation of the Tracy Pumping Plant is weaker than the showing found inadequate by this Court with respect to the canal operations concerned in *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925); and *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929). In *Sanitary District*, *supra*, 266 U.S. at 427-428, however, this Court held only that a federal statute granting land to a state to aid it in constructing a canal did not give the state irrevocable discretion to divert unlimited quantities of water through the canal, where such a diversion would impair navigation on the Great Lakes. Similarly, in *Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 416-417, this Court held that certain congressional actions arguably related to a state diversion project did not constitute authorization for the state diversion, where no attempt to quantify the proposed diversion was ever made. Here, in contrast, the federal defendants do not assert an unlimited right to divert water. To the contrary, as already shown, the Secretary of the Interior sought and obtained congressional authority to construct and operate a project for the purposes of diverting a precisely quantified amount of water at a specified location.

4. Petitioners also assert (Pet. 31-37) that the decision below conflicts with this Court's recent decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), because the court of appeals

relied, in part, upon appropriations Acts. In *TVA* v. *Hill*, this Court found that Congress did not, merely by appropriating funds for the construction of a dam, impliedly repeal substantive legislation that effectively precluded construction of the dam. 437 U.S. at 189-191.

In contrast to *TVA* v. *Hill*, the present case does not involve a repeal by implication. Section 10, by its very terms, is inapplicable to projects that have been affirmatively authorized. Moreover, as petitioners concede (Pet. 9-10), the correct standard for determining whether a project has been so authorized is stated in 33 C.F.R. 322.3(c)(1), which requires a showing—through the terms of an Act or its legislative history—of approval for project plans of a given degree of specificity but which does not require that the Act relied on be other than an appropriations Act.[5] And, in *United States* v. *Arizona*, 295 U.S. 174, 186 (1935), a case construing Section 9 of the 1899 Act, 33 U.S.C. 401, this Court, in discussing whether Laguna Dam had been authorized for the purposes of Section 9, stated: "Congress has made appropriations for the benefit of the project of which it is a part and so recognized and approved the building of the dam. *Wisconsin* v. *Duluth*, 96 U.S. 379, 386 [(1877)]." In any event, as already discussed, the court below relied upon substantive enactments as well as appropriations acts.

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[5]The only type of legislation that the regulation states would ordinarily not be considered "sufficient authorization by Congress to satisfy the purposes of Section 10" is "general legislation by which Federal agencies are empowered to act." 33 C.F.R. 322.3(c)(1). No such statutes were relied on by the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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